REMARKS

In this Response, Applicants request a one-month extension of time, submit an Information Disclosure Statement, and traverse the Examiner's rejections. Silence with regard to any of the Examiner's rejections should not be construed as acquiescence to any of the rejections. Specifically, silence with regard to any of the rejections of the dependent claims that depend from an independent claim considered by Applicants to be allowable based on the Remarks provided herein should not be construed as acquiescence to any of the rejections. Rather, silence should be construed as recognition by the Applicants that the previously lodged rejections are moot based on the Remarks submitted by the Applicants relative to the independent claim from which the dependent claims depend. Applicants reserve the option to further prosecute the same or similar claims in the instant or a subsequent application. Claims 1-28 are pending in the instant application.

Extension of Time

As provided in the accompanying documents, Applicants petition for a one-month extension of time in which to file this Response.

Information Disclosure Statement

As provided in the accompanying documents, Applicants submit an Information Disclosure Statement and a Form PTO-1449 listing documents known to Applicants and/or their Attorney.

Applicants are not submitting copies of the documents listed on Form PTO-1449 because they were previously submitted in Applicants' September 12, 2002 Response. Applicants invite the Examiner to contact the Applicants' undersigned Attorney if questions arise concerning the Information Disclosure Statement.

Applicants respectfully request that the Examiner consider the Information Disclosure Statement.

Previously Filed Amendment

Applicants filed an Amendment in Applicant's September 12, 2002 Response.

Applicants note, however, that the Examiner's October 2, 2002 Advisory Action does not consistently indicate whether the Examiner entered this Amendment. Specifically, in Item 2 of

the Advisory Action, the Examiner indicated that "the proposed amendment(s) will not be entered because they raises new issues." But, in Item 7 of the Advisory Action, the Examiner indicated that "For purposes of Appeal, the proposed amendments ... will be entered."

Applicants' respectfully request that the Examiner definitively indicate the status of the Amendment included in Applicant's September 12, 2002 Response.

Additionally, should the Examiner determine that the previously filed Amendment has not been entered, Applicants respectfully request that the Examiner enter the Amendment forthwith.

Applicants' Response to Claim Rejections

Applicants considered the Examiner's rejections of the claimed subject matter as provided in the previously issued Office Actions and present Advisory Action. Applicants accordingly direct the Examiner to 37 C.F.R. § 1.104(c)(2), which provides that "the pertinence of each reference, if not apparent, must be clearly explained and each rejected claim specified." Further, MPEP 707 provides that "'[w]henever, on examination, any claim for a patent is rejected, or any objection ... made,' notification of the reasons for rejection and/or objection together with such information and references *as may be useful in judging the propriety of continuing the prosecution (35 U.S.C. 132) should be given.*" Applicants maintain and will further provide herein that the Examiner has not satisfied Examiner's obligations under the aforementioned rules and procedures, and further, that the Examiner has failed to provide a prima facie case of obviousness.

In the Examiner's January 28, 2002 Office Action, the Examiner rejected claims 1-5 under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 5,758,359 to Saxon (hereinafter referred to as "Saxon") in view of U.S. Patent No. 6,038,665 to Bolt et al. (hereinafter referred to as "Bolt").

In Applicants' April 29, 2002 Response, Applicants traversed the Examiner's rejection of independent claim 1 by identifying that the feature of independent claim 1 that includes "based on the condition, directing the processor to compare time signals for each data storage element to store data on the storage element having the earliest recorded data" is novel and nonobvious over the cited prior art. Applicants also included new method claims 6-18 and processor program claims 19-28 that included variations of such allowable feature of independent claim 1.

In the Examiner's July 17, 2002 Office Action, the Examiner issued a final rejection of claims 1, 5-9, 12-19, 22, and 24-28 under 35 U.S.C. § 103(a) as being unpatentable over Saxon in view of Bolt. The Examiner also rejected (final) claims 2-4, 10, 11, 20, and 21 under 35 U.S.C. § 103(a) as being unpatentable over Saxon in view of U.S. Patent No. 6,023,709 to Anglin et al. The Examiner stated that "the Saxon maximum size threshold indicates a maximum size (capacity of the storage medium) that the save set at the schedule level must not exceed. This parameter is chosen by the system administrator or the user, who determines that this is the maximum amount of data that can be backed up (reaching the capacity) (column 7, lines 19-27, Saxon)."

In Applicants' September 12, 2002 Response, Applicants noted that the Examiner *did not identify any reference to Saxon* to support the Examiner's assertion that Saxon's method or maximum size threshold is based on a storage capacity of the Saxon storage medium. Additionally, Applicants argued that, regardless of the meaning of the Saxon maximum size threshold, neither Saxon nor Bolt teaches the feature of Applicants' independent claim 1 that includes "directing a processor to compare time signals for each data storage element to store data on the data storage element having the earliest recorded data."

Nonetheless, in the Examiner's October 2, 2002 Advisory Action, contrary to the aforementioned 37 C.F.R. § 1.104(c)(2) and MPEP 707, Examiner failed to substantively respond to Applicants' arguments of the September 12, 2002, Response, and Examiner reiterated his seemingly baseless comments without providing reference to Saxon for support.

Applicants emphasize that the Examiner persists in acting contrary to 37 C.F.R. § 1.104(c)(2) and MPEP 707 by failing to provide a reference that supports the Examiner's assertion that the Saxon maximum size threshold is based on a storage capacity of the Saxon storage medium. Examiner also fails to address Applicants' references to Saxon which directly contradict Examiner's assertions regarding Saxon, namely Saxon col. 7, ll. 19-27, which expressly indicates that Saxon does *not* associate the Saxon maximum size threshold with a storage capacity. Rather, as explained in Applicants' September 12, 2002 Response, Saxon col. 7, ll. 19-27 specifically states that the maximum size threshold is "the maximum amount of data that can be backed up *in the allotted backup time*." Saxon does not contain any reference that associates the Saxon maximum size threshold with a storage capacity or a backup space.

Examiner acts in further defiance of 37 C.F.R. § 1.104(c)(2) and MPEP 707 in failing to provide Applicants with a reference to either of Saxon or Bolt that teaches the feature of Applicants' independent claim 1 that includes "directing a processor to compare time signals for each data storage element to store data on the data storage element having the earliest recorded data."

Accordingly, based on the foregoing Remarks and the Remarks included in Applicants' September 12, 2002 Response, Applicants consider claims 1-28 to be allowable.

Should the Examiner persist in rejecting claims 1-28, Applicants request that the Examiner substantively respond to Applicants' arguments and provide specific references to Saxon and Bolt to support the Examiner's assertions.

CONCLUSION

Based on the foregoing Remarks, Applicants respectfully submit that this application is in condition for allowance. Accordingly, Applicants request allowance. Applicants invite the Examiner to contact the Applicants' undersigned Attorney if any issues are deemed to remain prior to allowance.

Respectfully submitted,
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